83-434

No._____

Office Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1983

FRANK FOOLS CROW, etc., et al.,

Petitioners,

vs.

TONY GULLET, etc., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

(1) In resisting a Free Exercise challenge, is it sufficient for a State merely to allege a rational basis for its actions, without alleging and proving both public necessity and the absence of less restrictive alternatives?

(2) Is the licensing of religious activities invalid *per se*, or must the burden on free exercise be proved, theologically, by religious practitioners?

(3) Does the public display of a particular denomination's religious activities, involuntarily and to the detriment of Free Exercise, also violate the Establishment Clause?

TABLE OF CONTENTS

	Pages
Questions Presented	i
Opinions Below	2
Jurisdiction	2
Constitutional Provisions Involved	2
Statutory Provisions Involved	2
Statement of the Case	3
Proceedings Below	7
Relationship With Other Cases	10
Reasons For Granting The Writ:	
1. The Expansion of Public Recreation Is Not Sufficiently "Compelling" To Justify Disturbing A Central And Indispensible Place of Religious Worship.	11
2. State Respondents Should Bear The Burden Of Proving That Their Actions Do Not Infringe Impermissibly On Religious Exercise.	13
3. Requiring Worshipers To Obtain Discretionary Permits For The Use Of Bear Butte Was A *Per Se* Violation Of The Free Exercise Clause.	14
4. Devoting Public Funds To The Involuntary Display Of Petitioners' Religious Practices Also Violates The Establishment Clause.	16
Conclusion	18

TABLE OF CONTENTS—Continued

Pages

Appendices:

A. Opinion of the District Court 1a-1

B. Opinion of the Court of Appeals 1b-1

C. Judgment 1c-1

D. Order Denying Petition for Rehearing *En Banc* 1d-1

TABLE OF AUTHORITIES

CASES:

Badoni v. Higginson, 445 F. Supp. 641 (D. Utah 1977), aff'd 638 F. 2d 172 (10th Cir. 1980), cert. den. 452 U. S. 951 (1981) 4

Brown v. Peyton, 437 F. 2d 1228 (4th Cir. 1971) 11

Clark v. Wolff, 347 F. Supp. 887 (D. Neb. 1972), aff'd 468 F. 2d 252 (8th Cir. 1972) 18

Committee for Public Education & Religious Liberty v. Regan, 444 U. S. 646 (1980) 16

Dunham v. Pulsifer, 312 F. Supp. 411 (D. Vt. 1970) 12

Frank v. Alaska, 604 P. 2d 1068 (Alaska 1979) 11

Gillette v. United States, 401 U. S. 437 (1971) 11

Harris v. McRae, 448 U. S. 297 (1980) 16

Holmes v. Silver Cross Hospital, 340 F. Supp. 125 (D. Ill. 1972) 12

Howe v. Brown, 319 F. Supp. 862 (D. Ohio 1970) 12

In re Jemison, 375 U. S. 14 (1963) 11

TABLE OF AUTHORITIES—Continued

Pages

In re Osborne, 294 A. 2d 392 (D. C. App. 1972) 12

Larson v. Valente, 456 U. S. 228 (1982) 11, 15, 16

Lawson v. Commonwealth, 164 S. W. 2d 972 (Ky. 1942) 11

Lemon v. Kurtzman, 403 U. S. 602 (1971) 16

Marsh v. Chambers, 51 L. W. 5163 (July 5, 1983) No. 82-23 16

Montgomery v. Board of Retirement, 109 Cal. Rptr. 181 (1973) 12

Mueller v. Allen, 51 L. W. 5050 (June 29, 1983) No. 82-195 16

Oneida Nation v. County of Oneida, 414 U. S. 661 (1974) 10

Oglala Sioux Tribe v. Homestake Mining Co., No. 82-2101-SD (8th Circuit) 10

Oglala Sioux Tribe v. United States, 650 F. 2d 140 (8th Cir. 1981), cert. den. 455 U. S. 907 (1982) 10

People v. Woody, 394 P. 2d 813 (Cal. 1964) 11

Sequoyah v. Tennessee Valley Authority, 480 F. Supp. 608 (D. Tenn. 1979), aff'd 620 F. 2d 1159 (6th Cir. 1980), cert. den. 449 U. S. 953 (1980) 4

Sherrill v. Knight, 569 F. 2d 124 (D. C. Cir. 1977) 11

Sherwood v. Verner, 374 U. S. 398 (1963) 11

Shuttlesworth v. City of Birmingham, 394 U. S. 147 (1969) 15

TABLE OF AUTHORITIES—Continued

Pages

Staub v. City of Baxley, 355 U. S. 321 (1958) 15

Stone v. Graham, 449 U. S. 39 (1980) 7, 14

Surinach v. Pesquera de Busquets, 604 F. 2d 73 (1st Cir. 1979) 14

Thomas v. Indiana Employment Security, 450 U. S. 707 (1981) 13

Toney v. Berglund, 645 F. 2d 1063 (D. C. Cir. 1981) 9

United States v. Dann, 706 F. 2d 919 (10th Cir. 1983) 10

United States v. Lee, 455 U. S. 252 (1982) 11, 13

United States v. Sioux Nation, 448 U. S. 371 (1980) 10

Vetter v. Frosch, 599 F. 2d 630 (5th Cir. 1979) 9

Weaver v. Jago, 675 F. 2d 116 (6th Cir. 1982) 12

Widmar v. Vincent, 454 U. S. 263 (1981) 11, 16

Wisconsin v. Yoder, 406 U. S. 205 (1972) 12, 13

U. S. Constitution and Statutes:

First Amendment 2, 6, 11, 12, 13, 15, 17

Fourteenth Amendment 2

Treaty of September 15, 1851, 11 Stat. 749 10

Treaty of April 29, 1868, 15 Stat. 635 10

Act of February 28, 1877, 19 Stat. 254 10

TABLE OF AUTHORITIES—Continued

Pages

42 U. S. C. § 1983 7

42 U. S. C. § 1996 ..... 2, 17

28 U. S. C. § 1254 2

MISCELLANEOUS:

House Report No. 95-1308 (1978) 17

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Frank Fools Crow and others, as representatives of the class of persons practicing the Lakota (Sioux) and Tsistsistas (Cheyenne) religions, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the District Court in this case is reported at 541 F. Supp. 785 (D. S. D. 1982), and reproduced in the Appendix (App. 1a). The opinion of the Eighth

Circuit, not yet officially reported, is reproduced in the Appendix (1b), together with the orders affirming the District Court's judgment and denying Petitioners' motion for rehearing *en banc* (1c, 1d).

JURISDICTION

The Eighth Circuit affirmed the District Court's judgment on May 10, 1983, and denied Petitioners' motion for rehearing *en banc* on June 14, 1983. This petition for certiorari was timely filed within 90 days of the last date. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment:

> Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; . . .

Fourteenth Amendment:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny any person within its jurisdiction of the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

42 U. S. C. § 1996:

> It shall be the policy of the United States to protect and preserve the American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, . . . includ-

ing but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

STATEMENT OF THE CASE

This was an attempt to enjoin the State of South Dakota and its employees from developing Bear Butte for tourism and recreational camping. Since time immemorial, Bear Butte has been the principal ceremonial site for practitioners of the Lakota and Tsistsistas religions, and has always been central and indispensible to the major ceremonies of the life cycle and the seasonal cycle of the year. "Bear Butte is so sacred we cannot live without it," explained Lakota plaintiff and medicine man Pete Catches (Jt.App. p. 103).* "It is there that medicine men receive their powers." According to plaintiff Larry Red Shirt,

> the original instructions of the Lakota [were] given by the Creator on a sacred mountain similar to the way the Ten Commandments were given to Moses on a mountain. . . . [T]he Lakota people originated in the Black Hills and [the] sacred instructions given to us by the Creator were given to us on Bear Butte. This makes Bear Butte the central and most sacred mountain to the Lakota people.

(Jt.App. pp. 36-37). The Sacred Buffalo Calf Pipe of the Lakota came from Bear Butte, and is most powerful when used there. Plaintiff Arvol Looking Horse is the 36th Keeper of the Pipe since the Lakota received it more than nine centuries ago.

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*"Jt.App." refers to the Joint Appendix of the parties on appeal to the Eighth Circuit, which includes affidavits and the transcript of the June 18, 1982 hearing on plaintiffs' (Petitioners here) request for a preliminary injunction.

Bear Butte is at least equally significant for the Tsistsistas. "Nowahwus [Bear Butte] is the holy mountain of the Tsistsistas," plaintiff Laird Cometsevah told the district court. "Each Tsistsistas makes at least one religious pilgrimage to Bear Butte" during his lifetime (Jt.App. p. 23), just as Moslems make at least one pilgrimage to Mecca, because "the Four Sacred Arrows of the Cheyenne came from within Bear Butte as a covenant with the Almighty God Maheo."

> Bear Butte is the holiest place to the Cheyenne people, who use the mountain regularly for pilgrimages, and who think about it every day, and who mention it in their prayers.

(Plaintiff Walter Hamilton, Jt.App. pp. 25-26), as Jews refer to Jerusalem in their prayers. In short, Bear Butte is both Jerusalem and Sinai to the Sioux and Cheyenne.

Some 4,000 Lakota and Tsistsistas worshippers visited the Butte in 1981, the year before the commencement of this action. Bear Butte's religious importance was stipulated by Respondents and noted by the district court in the course of the proceedings (Jt.App. pp. 94, 163, 186, 188). This is not a case, then like *Badoni v. Higginson*, 638 F. 2d 172 (10th Cir. 1980), or *Sequoyah v. Tennessee Valley Authority*, 620 F. 2d 1159 (6th Cir. 1980), where Indians' religious interest in a site was historical, incidental, or limited to infrequent use by a few medicine men.

Seclusion and solitude are indispensible to Lakota and Tsistsistas ceremonies. "When we go on a fast," medicine man Catches explained, "we wish to be excluded from the world" (Jt.App. p. 108). Noise, traffic, and interruption "interferes with all participants of the vision quest because

it distracts the person who is seeking the vision as well as his supporters; it interferes with communication with the spirit world; and destroys the strength of the ceremony itself" (Jt.App. p. 39). Spiritual concentration also requires that the mountain itself retain its natural topographic unity, free from artificial objects and physical disturbance.

> In order for the Butte to hold its sacred powers, it must remain in its natural state as it was in the beginning. The power of the Butte is diminished each time a permanent man-made structure or alteration is made. Eventually, even [our own] sweat lodges must be torn down for this reason.

(Jt.App. p. 40). Roads and buildings create "a distraction and it just pulls our meditation and concentration away from prayer" (Jt.App. pp. 109, 119, 122, 126).

Since 1962 the State of South Dakota has physically altered the Butte to develop it as a public park. Changes include roads, machine shops, wooden walkways, parking lots, campgrounds, and a permanent Visitor's Center. As a natural and intended consequence of State efforts to promote and increase the accessibility of Bear Butte, tourism has swelled to more than 100,000 visits yearly (Jt.App. p. 185). Besides desecrations of the mountain's natural topography, Petitioners suffered the loss of the solitude needed for effective prayer and visions and frequent instances of tourists interrupting ceremonies and removing ceremonial objects (Jt.App. pp. 23, 33, 39-40). Construction, noise and traffic have reached the point that most worshippers can no longer fulfill their religious needs on the Butte (Jt.App. pp. 20-22, 33, 42-43). Only the most powerful medicine men can still find visions there (Jt.App. p. 115).

In April, 1982, Respondents began to require discretionary permits for all users of the Butte, including Lakota and Tsistsistas worshippers, and limited where they could camp and pray (Jt.App. pp. 21, 132-33, 204). This was accompanied by an overnight use fee until Petitioners responded by filing this action (Jt.App. pp. 21, 179, 184, 205). The Butte was completely closed for one month during the 1982 ceremonial season (Jt.App. pp. 60, 178). These restrictions were imposed without consultation or public hearings, and without any form of written regulations or guidelines (Jt App. pp. 129, 132-33, 176-77, 179-80). The terms and conditions of religious use of the Butte continues to be at the discretion of State employees.

An explicit purpose of Respondents' activities has been to expose Petitioners' religious practices to public view so they can learn about "the traditional Indian religious experience" (Jt.App. pp. 136, 151-53, 158, 184, 186). Respondents employ an "interpretive specialist" at the Butte to tell tourists about its "historical and cultural significance and explain to them the spiritual value of the mountain," thus drawing attention to Petitioners' activities (Jt.App. pp. 209-10). Respondents furthermore admit "balancing" Petitioners' privacy and religious freedom with tourists' interests in the day-to-day operation of park facilities (Jt.App. p. 153).

Petitioners strenuously object to the idea that religious freedom can be sacrificed in the name of historical or cultural preservation. It cannot be an appropriate exercise of public authority, consistent with the First Amendment, to make a public zoo out of a people's church—especially where privacy and seclusion are essential to the

consummation of worship. If Petitioners fail here, South Dakota would be free to seize a church or synagogue and operate it for public amusement, on the pretext of public education. There are serious Establishment problems with the use of public funds to renovate and maintain religious facilities under guise of "historical preservation." Both Establishment *and* Free Exercise problems combine when the renovation proceeds over worshippers' protests,* and has the practical effect of abolishing the religion the State purports to be preserving.

PROCEEDINGS BELOW

In their May, 1982, complaint, Petitioners sought a declaration of their right to the full, unrestricted and uninterrupted religious use of Bear Butte, and for injunctive relief from construction projects altering the Butte's natural topography. Petitioners also sought damages under 42 U. S. C. § 1983 for deprivation of their civil rights, particularly for the month they were completely excluded from the Butte, and for restrictions on access and use thereafter. Petitioners were certified as a class, 541 F. Supp. at 787

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* Respondents testified that "numerous people" who "appeared to be American Indian people" but could not be identified further had requested improved road access (Jt. App. pp. 174, 198-99), and that Petitioner Fools Crow told them he was "pleased" with the changes (Jt.App. pp. 211-13), which Fools Crow denied (Jt.App. pp. 45-46). Petitioners' objections for hearsay were overruled (Jt.App. pp. 211-13). Of course it is irrelevant whether Respondents' actions were well-intentioned, the issue being whether they burden the exercise of Petitioners' religion. *Stone v. Graham*, 449 U. S. 39, 41 (1980). Hearsay is a flimsy foundation for the district court's believing, 541 F. Supp. at 789, that there was little or no actual burden.

n. 1, and at a June 18, 1982 hearing on Petitioners' request for a preliminary injunction, the parties stipulated to proceeding in the form of cross-motions for summary judgment, 541 F. Supp. at 788, Jt.App. p. 190.

After reviewing this record, the district court granted Petitioners' preliminary injunction, reserving judgment on "whether or not what the State is doing would have a detrimental effect on the practice of the religion" (Jt.App. pp. 106-7, 188). Seven days later, the district court dissolved the injunction and dismissed Petitioners' action in its entirety, ruling *inter alia* that Respondents "have not burdened" the exercise of religion at Bear Butte by "allowing" tourism, by requiring worshippers to obtain permits for each use, or by restricting where and when worshippers may camp or conduct ceremonies, 541 F. Supp. at 792-93. This was based in part on finding that Respondents' actions were motivated by a desire to aid Petitioners, and the belief that Petitioners approved, 541 F. Supp. at 789-90, 791. It was also based on finding that Respondents had *not in fact* restricted religious access or impaired religious fulfillment, 541 F. Supp. at 791-93, which required believing all of Respondent's testimony and none of Petitioners'.

On appeal, the Eighth Circuit affirmed without discussion, justifying the district court's disbelieving Petitioners' allegations and testimony by treating the June 18, 1982 hearing as a full trial on the merits notwithstanding the parties' stipulations and district court's ruling to the contrary (Appendix 3b).

> **Trial findings, of course, must be affirmed unless clearly erroneous, with the inferences generally drawn**

> in the judgment's favor. On review of a summary judgment on the other hand, the party against whom summary judgment was granted has the benefit of all reasonable evidentiary inferences that can be drawn in his favor.

Toney v. Berglund, 645 F. 2d 1063, 1066 (D. C. Cir. 1981). It is true that "[i]n some circumstances cross-motions for summary judgment *in a federal employee Title VII case* may be treated for purposes of review as a mutual request for trial *on the stipulated administrative record*," 645 F. 2d at 1066 (emphasis supplied), citing *Vetter v. Frosch*, 599 F. 2d 630 (5th Cir. 1979), but this exception only applies to trial *de novo* on appeal from a federal hearing examiner. If the proper standard on appeal is observed here, the decisions below must be reversed as contrary to the evidence.

Neither the district court nor the Court of Appeals specifically addressed whether Respondents' park expansion was sufficiently "compelling" to overcome Petitioners' constitutional right to Free Exercise—nor whether Respondents had chosen the least restrictive alternative for expanding public recreation. This omission is fatal. Petitioners challenged Respondents' purpose in developing the Butte, noting the lack of public necessity or a threat to public safety or order. Petitioners also alleged (and Respondents admitted) that there already are 90,000 acres of State parks, 272,000 acres of national parks, and 2 million acres of multiple-use national forests in South Dakota (Jt.App. pp. 53, 165). As a recreational site, Bear Butte would add only a few hundred acres. Its principal attraction is the opportunity to place Petitioners' religion on public display (Jt.App. pp. 136, 164).

RELATIONSHIP TO OTHER CASES

Bear Butte is located in the Black Hills area jointly reserved by the Lakota and Tsistsistas in the Treaty of September 15, 1851 (11 Stat. 749), and the Treaty of April 29, 1868 (15 Stat. 635). It was never sold or relinquished. Respondents derive their alleged title to the Butte through mesne conveyances from the United States, which confiscated the territory in 1877. Act of February 28, 1877 (19 Stat. 254); *United States v. Sioux Nation*, 448 U.S. 371, 417 (1980). The Indian Claims Commission awarded the "Sioux Nation" the net sum of $102.5 million for the 27 million acre tract, which has not yet been paid, but neither the Oglala Sioux Tribe (one of the seven allied Lakota "Sioux" peoples) nor the Tsistsistas participated in that action. In 1980, the Oglalas filed to quiet title to the Black Hills contending, *inter alia*, that Congress could not constitutionally require them to accept money compensation for the loss of indispensible religious sites. *Oglala Sioux Tribe v. United States*, 650 F. 2d 140 (8th Cir. 1981), *cert den.* 455 U.S. 907 (1982). The Eighth Circuit held that Congress may prescribe an exclusive money remedy for its own unconstitutional actions.

The Indian Claims Commission Act does not preclude tribal land claims against private persons, however. *Oneida Nation v. County of Oneida*, 414 U.S. 661 (1974); *United States v. Dann*, 706 F. 2d 919 (10th Cir. 1983). Dismissal of Oglala claims against private landowners is still pending appeal in the Eighth Circuit. *Oglala Sioux Tribe v. Homestake Mining Co.*, No. 82-2101-SD. The ownership of Bear Butte and other Black Hills lands therefore remains unsettled. Contrary to the district court's assertion

that Petitioners have "no property interest" in the Butte, 541 F. Supp. at 791, Oglala members of the class of persons practicing the Lakota religion retain a live legal claim to the area, and Tsistsistas practitioners have a potential claim not yet asserted through litigation.

REASONS FOR GRANTING THE WRIT

1. The Expansion Of Public Recreation Is Not Sufficiently "Compelling" To Justify Disturbing A Central And Indispensable Place Of Religious Worship.

Our Constitution wisely permits the restriction of religious freedom only if necessary to protect a "compelling" or "overriding" public interest, and even then only by legislation narrowly drawn to minimize the sacrifice of First Amendment rights. *Larson v. Valente*, 456 U.S. 228, 247 (1982); *United States v. Lee*, 455 U.S. 252, 257 (1982); *Widmar v. Vincent*, 454 U.S. 263, 270 (1981). Imminent threats to public safety and national defense satisfy the "compelling state interest" test. *Gillette v. United States*, 401 U.S. 437 (1971) (selective service); *Sherrill v. Knight*, 569 F. 2d 124, 130 (D. C. Cir. 1977) (safety of the President); *Brown v. Peyton*, 437 F. 2d 1228, 1231 (4th Cir. 1971) (prison discipline); *Lawson v. Commonwealth*, 164 S. W. 2d 972 (Ky. 1942) (poisonous snakes). Legitimate, but less "paramount" state interests fail. *Sherwood v. Verner*, 374 U.S. 398 (1963) (Sunday closing laws); *In re Jemison*, 375 U.S. 14 (1963) (jury duty); *Frank v. Alaska*, 604 P. 2d 1068 (Alaska 1979) (game conservation); *People v. Woody*, 394 P. 2d 813 (Cal. 1964) (personal use of hallucenogens).

"The 'compelling state interest' standard . . . calls upon the state to show more than a link of reasonable-

ness." *Dunham v. Pulsifer,* 312 F. Supp. 411, 417 (D. Vt. 1970). It calls for "'more exacting scrutiny' than the 'reasonable relation' test provides." *Howe v. Brown,* 319 F. Supp. 862, 864 (D. Ohio 1970). "A state's restriction on the free exercise of religion may not be upheld merely because some rational basis exists therefor; First Amendment rights do not rest on such slender grounds." *Holmes v. Silver Cross Hospital,* 340 F. Supp. 125, 130 (D. Ill. 1972). The limiting adjective, "compelling," limits state intrusions to "only those interests of the highest order and those not otherwise served." *Wisconsin v. Yoder,* 406 U.S. 205, 215 (1972). This means that "the state must do more than simply offer conclusory statements that a limitation on religious freedom is required for security, health or order." *Weaver v. Jago,* 675 F. 2d 116, 118 (6th Cir. 1982). Public necessity must be proved.

Here, however, Respondents did not even *allege* a threat to public health, safety or order. They did not suggest that Petitioners' activities are harmful to themselves or to others.* They merely indicated the desirability of making Bear Butte more accessible to tourists. They offered no reason why additional scenic (and educa-

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* Respondents did contend that *one road* needed repair for safety in bad weather, 541 F. Supp. at 794, but Petitioners dispute this (Jt.App. pp. 109-10) and there was no expert testimony to support Respondents' claims. Even if true, this would affect only a fraction of Petitioners' concerns. Nor do Respondents necessarily have constitutional authority to protect adults from physical harm in violation of religious scruples. *Holmes v. Silver Cross Hospital, supra; In re Osborne,* 294 A. 2d 392 (D. C. App. 1972); *Montgomery v. Board of Retirement,* 109 Cal. Rptr. 181 (1973); involving religious objections to medical treatment where no epidemic disease or threat to other persons was proved.

tional) parkland could not be developed elsewhere, and their suggestion that Bear Butte should be renovated to expose tourists to "the traditional Indian religious experience" stands logic on its head: in order to save it we had to destroy it. The same reasoning would justify the eviction of churches to preserve the buildings as landmarks, or the seizure of the nation's printing presses for display in museums. The rights of free speech, press and religion cannot constitutionally be subverted on the pretext of fossilizing their artifacts for posterity.

2. State Respondents Should Bear The Burden Of Proving That Their Actions Do Not Infringe Impermissibly On Religious Exercise.

It was not for the district court to determine whether Petitioner's objections to Respondents' activities on the Butte were theologically sound. The resolution of theological questions "is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Indiana Employment Security*, 450 U. S. 707, 714 (1981). "It is not within 'the judicial function and judicial competence'" for courts to dispute the "proper interpretation" of matters of religious faith. *United States v. Lee*, 455 U. S. 252, 257 (1982). It is sufficient that Petitioners' beliefs are sincere, and of a religious nature. *Wisconsin v. Yoder*, 406 U. S. 205, 215-19 (1972). Moreover, "in the sensitive area of First Amendment freedoms, the burden is on the state to show that implementation of a regulatory scheme will *not* ultimately infringe upon and entangle it with the affairs of religion,"

not on worshippers to prove that it will. *Surinach v. Pesquera de Busquets,* 604 F. 2d 73, 75-76 (1st Cir. 1979) (emphasis in the original).

Notwithstanding Petitioners' uncontradicted testimony concerning the disruption and diminished effectiveness of ceremonies at Bear Butte, the district court states, 541 F. Supp. at 791, that they "failed to show that the construction projects now in progress, as well as the past developments in the park, have burdened any rights protected by the free exercise clause." This reverses the burden of proof. Petitioners made out a *prima facie* case for the central importance of Bear Butte, the necessity of seclusion and privacy in ceremonies, and the extent to which worshippers had been restricted and disturbed by Respondents and their invitees. Respondents countered merely by asserting their good intentions (Jt.App. pp. 157-59, 169, 177, 183), and that they did not "believe" they were infringing on Petitioners' rights (Jt.App. pp. 162, 186). With all due respect, Respondents' good wishes and beliefs are immaterial. The relevant question is the extent of actual interference with religious practices, *Stone v. Graham,* 449 U.S. 39, 41 (1980), and to this extent Petitioners' statements in the record were uncontradicted.

3. Requiring Worshippers To Obtain Discretionary Permits For The Use Of Bear Butte Was A Per Se Violation Of The Free Exercise Clause.

The district court also found that requiring worshippers to apply for discretionary permits before using the Butte "has not burdened" religious freedom because it does "not require [Petitioners] to violate any tenet of their religion," 541 F. Supp. at 793. This, too, is a mis-

application of established law. A licensing scheme need not violate a specific theological tenet to fail constitutional scrutiny. Unless adequately justified, licensing of religious worship is a *per se* violation of the First Amendment.

> [A]n ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such an official—is an unconstitutional censorship or prior restraint upon the enjoyment of these freedoms.

Shuttlesworth v. City of Birmingham, 394 U. S. 147, 151 (1969), quoting from *Staub v. City of Baxley,* 355 U. S. 321, 322 (1958). Requiring a church to register and file an annual financial disclosure statement is therefore "burdensome and intrusive" in and of itself. *Larson v. Valente,* 456 U. S. at 253 n. 29.

Here, Respondents retain absolute discretion, without any written standards or guidelines, to exclude Petitioners from the Butte, and to impose restrictions on their use of ceremonial sites. We gravely doubt Respondents would be allowed to impose similar restrictions on the use of Christian churches in South Dakota, whether or not Christian theology contains specific objections to the licensing of prayer. Although Respondents have as yet rarely excluded any of Petitioners from the Butte, this is irrelevant. The continued assertion of authority to exclude, without prescribed standards, is repugnant to the First Amendment. Respondents' current informal "pol-

icy" of permitting religious activities on the Butte is no assurance against future abuses.*

4. Devoting Public Funds To The Involuntary Display Of Petitioners' Religious Practices Also Violates The Establishment Clause.

"[A] legislative enactment does not contravene the Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive government entanglement with religion." *Committee for Public Education & Religious Liberty v. Regan*, 444 U. S. 646, 653 (1980), following *Lemon v. Kurtzman*, 403 U. S. 602, 612-13 (1971). Also see *Harris v. McRae*, 448 U. S. 297, 319 (1980); *Widmar v. Vincent*, 454 U. S. 263, 271 (1981). Public support for, or protection of institutions with religious affiliations is no longer automatically invalid if part of a "facially neutral" policy, *Mueller v. Allen*, 51 L. W. 5050, 5051, 5053-54 (June 29, 1983), nor is "a tolerable acknowledgment of beliefs" by public agencies, provided there is no attempt "to proselytize or advance any one, or to disparage any other, faith or belief," *Marsh v. Chambers*, 51 L. W. 5163, 5165 (July 5, 1983). "The clearest command of the First Amendment is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U. S. at 244.

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* The district court found that *none* of Petitioners ever had been excluded, 541 F. Supp. at 793, ignoring the month-long closure of the Butte in 1982 and at least one worshipper's uncontradicted testimony that she was turned away because she could not afford the overnight camping fee (Jt.App. pp. 21-22).

In the present case, Respondents selectively deprived Petitioners' religion of protection from vandalism and disruptions, for the explicit purpose of selectively exploiting Petitioners' religion for others' educational and recreational enjoyment. A more perverse government entanglement with religion can scarcely be imagined. On the one hand, Petitioners no longer enjoy the same privacy and security as other religious congregations in South Dakota —or, indeed, by all South Dakotans. No other church can be invaded and disrupted with such impunity, or at the State's invitation and expense. On the other hand, no religious congregation in South Dakota is exposed to public view involuntarily and exploited for recreational purposes. Petitioners doubt there would be any question of their right to privacy were they not American Indians practicing traditional American Indian religions. Yet Congress has made it plain that traditional Indian religions are entitled to equal respect under the First Amendment. 42 U. S. C. § 1996. This enactment expressly protects Indians' right of "access to sites" such as Bear Butte.

> Often, these locations include certain sites—a hill, a lake, or a forest glade—which are sacred to Indian religions. Ceremonies are often required to be performed in these spots. To deny access to them is analogous to preventing a non-Indian from entering his church or temple. Many of these sites not in Indian possession are owned by the Federal Government and a few are on State lands.

House Report No. 95-1308 (1978), at 2. Special legislation was deemed necessary because of "the perception of many non-Indian officials that because Indian religious practices are different than their own that they somehow do not have the same status as a 'real' religion." *Ibid.* 4.

Petitioners ask to be free from government-sponsored intrusions. They will happily do without the all-weather roads and running water Respondents apparently feel they should have (Jt.App. pp. 109-10). Respondents' avowed solicitude for Petitioners' religious welfare is both misplaced and unconstitutional, tending only to destroy what it purports to protect. Petitioners simply aspire to privacy, personal security, and freedom from exploitation of their religious practices, not that government "provide the means for carrying them out." *Clark v. Wolff*, 347 F. Supp. 887, 890 (D. Neb. 1972), *aff'd* 468 F. 2d 252 (8th Cir. 1972). This is no more—or less—than other denominations properly expect and receive under the Constitution.

CONCLUSION

For the foregoing reason, Petitioners suggest that a writ of certiorari should be issued to the Court of Appeals for the Eighth Circuit.

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APPENDIX 1A

UNITED STATES DISTRICT COURT
District of South Dakota

June 25, 1982

Chambers of Andrew W. Rogue, Chief Judge
318 Federal Building
Rapid City, South Dakota 57701

Mr. Mario Gonzalez
Attorney at Law
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Mr. Mark V. Meierhenry
Attorney General
State of South Dakota
State Capitol
Pierre, South Dakota 57501

Re: Frank Fools Crow, Arvol Looking Horse, Pete Catches, Grover Horned Antelope, Larry Red Shirt, Selo Black Crow and Francine Nelson, For Themselves and On Behalf of the Lakota Nation and Persons Practicing the Lakota Religion, and Bill Red Hat, Jr., Terry Wilson, Laird Cometsevah, Walter Hamilton, the Southern Cheyenne Research and Human Development Association, Inc., For Themselves and On Behalf of the Tsistsistas Nation and Persons Practicing the Tsistsistas Religion vs. Tony Gullet, In His Official Capacity as Park Manager of Bear Butte State Park; The South Dakota State Game, Fish and Parks; and the State of South Dakota—CIV82-5047

Gentlemen: *MEMORANDUM OPINION*

Bear Butte is a geological formation which stands at the eastern edge of the Black Hills. The Butte has immense cultural and historical importance to this area. Bear Butte was purchased by the State of South Dakota in 1962,

and was designated by the South Dakota Legislature as a State Park. SDCL 41-17-1(1). The Legislature delegated the power to manage and improve state parks for the benefit of the general public to the defendant Department of Game, Fish and Parks. The defendant Tony Gullet is the Department's manager at Bear Butte State Park.

The plaintiffs in this action include traditional chiefs and spiritual leaders of the Lakota Nation and the Tsistsistas Nation.[1] The plaintiffs contend that Bear Butte is the most powerful ceremonial site for the religious practices of the Lakota and Tsistsistas people. In this action the plaintiffs challenge the constitutionality of the defendants' conduct at Bear Butte. Specifically, plaintiffs object to projects, some of which began in April, 1982, by which defendants constructed roads, bridges, parking lots, and other access facilities at Bear Butte. Plaintiffs also object to alleged attempts by defendants to restrict or regulate the access of plaintiffs to Bear Butte for worship and ceremonial purposes.

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[1]Plaintiffs requested this Court to certify this proceeding as a class action. The class to be represented would be the Lakota Nation, persons practicing the Lakota religion, the Tsistsistas Nation, and persons practicing the Tsistsistas religion. It appears that class actions seeking protection of constitutional rights are particularly appropriate under Rule 23(b)(2). This Court further finds: (1) that an adjudication with respect to individual members of the class would as a practical matter be dispositive of the interests of the other members not parties to the adjudication; and (2) that defendants have acted on grounds generally applicable to the class. *See Petersen v. Talisman Sugar Corp.*, 478 F. 2d 73 (5th Cir. 1973); Wright and Miller, *Federal Practice and Procedure, Civil* §§ 1775-76. Therefore, final injunctive or declaratory relief is appropriate with respect to the class as a whole. Accordingly, this Court has certified this action as a class action pursuant to Rule 23 (b)(2) of the Federal Rules of Civil Procedure.

Accordingly, plaintiffs brought this action for declaratory and injunctive relief, and for damages. They contend that defendants' actions both restricting and regulating access to the Butte for religious purposes violates the Free Exercise Clause of the first amendment, the American Indian Religious Freedom Act, 42 U. S. C. § 1996, Article 18 of the Universal Declaration of Human Rights, and Article 18 of the International Covenant on Civil and Political Rights. Plaintiffs assert that these provisions also establish the right of the Lakota and Tsistsistas people to the "continued natural topographic unity and isolation of Bear Butte. . . ." On this basis plaintiffs oppose the constructive projects.

Plaintiffs request this Court to declare plaintiffs' right to full, unrestricted and uninterrupted religious use of the Butte. Additionally, plaintiffs seek an injunction precluding defendants from restricting or regulating plaintiffs' access to and use of Bear Butte for religious purposes. Plaintiffs seek an injunction not only to enjoin construction projects or any other alteration of the natural features of the Butte, but they also request this Court to order defendants to remove any roads, parking lots and buildings currently in place at the park. Finally, plaintiffs seek over one million dollars in damages for the alleged deprivation of their civil rights. 42 U. S. C. § 1983. This Court has jurisdiction of the controversy pursuant to 28 U. S. C. §§ 1331, 1343(3) and (4).

On June 18, 1982, this Court heard the evidence on a motion for a preliminary injunction. After the hearing, the parties agreed that the evidentiary hearing on the motion could be consolidated with the trial on the merits.

The merits of this case are before this Court on the parties' cross-motions for summary judgment.

The plaintiffs presented several witnesses in addition to numerous affidavits. Plaintiffs' witnesses included two Lakota medicine men. They stated that Bear Butte was the site where the Lakota originally met with the Great Spirit. It was the place of instruction and remains today the most significant site of Lakota religious ceremonies. To the Tsistsistas, Bear Butte likewise is the site of pilgrimages where worshipers go to receive the powers and benefits of the Great Spirit. Additionally, Lakota worshipers conduct the Vision Quest at Bear Butte. The Quest is one of the seven sacred ceremonies of the Lakota people. During the Quest, the vision seeker and all his family and companions must be purified by means of the "sweat lodge" ceremony. The worshipers fast during this time. The vision seeker climbs to a solitary place on the Butte where he prays aloud and sings. The vision seeker may leave sacred gifts on the Butte for the Great Spirit. During the Vision Quest, which may last up to four days, the companions wait below the Butte, and sing honorary songs and pray.

In this action, plaintiffs contend that the conduct of the defendants and the general public at Bear Butte destroys the sanctity and power of the religious ceremonies and violates their right to exercise freely their religious beliefs. Specifically, defendants have allegedly desecrated the ceremonial area at the foot of the Butte through the construction of access roads and parking lots. Defendants also constructed wooden viewing platforms on the Butte. It is also alleged that defendants disrupt ceremon-

ies and interfere with the worshipers by permitting tourists to camp at the Butte and hike to the top of the mountain. Plaintiffs' witnesses stated that tourists violate the sanctity of the ceremonies by taking photographs, carrying food and water on the Butte, taking the worshiper's offerings from the Butte, and bothering prayers and singers. Plaintiffs alleged that defendants violate their constitutional rights by *allowing* tourists to behave as set forth above. Finally, plaintiffs allege that defendants denied the worshipers access to roots and plants necessary for Vision Quest ceremonies at the Butte.

The defendants agreed that Bear Butte is a traditional, significant religious site for the Lakota and Tsistsistas people. In fact, defendants maintain the park, in part, to serve and assist Indian worshipers. The State also manages Bear Butte State Park for the benefit of the general public. The park has educational facilities through which the public can discover the importance of the Butte to the original development of the Black Hills, as well as the geological and Indian religious values of the Butte.

This most recent dispute apparently arose when the defendants began several construction projects at the park. *See,* Exhibit 3. Most important of these projects was an access road and parking lot adjacent to the area southeast of the Butte traditionally used by Indians as a ceremonial ground and campsite. The State maintains this campsite for the exclusive use of ceremonial campers. The general public is not authorized to drive to or camp in this area. Defendants found, however, that the vehicles of the ceremonial campers became mired in the mud near the camp-

site; the makeshift road also provided poor access to the campsite. As a result of vehicle traffic through the open fields, vegetation was destroyed and erosion occurred. For this reason defendants sought and received authorization to build the road and parking lot at the ceremonial grounds. Although plaintiffs' witnesses abhored the desecration represented by the construction, defendants contend many worshipers in the past urged the State to provide better and safer access to the site. The parking lot does not occupy the area utilized for ceremonies. It would occupy the same area used by worshipers to park their automobiles in the past. At this ceremonial area the defendants also provide services such as outdoor bathroom facilities, garbage disposal, and free firewood. The plaintiffs apparently do not object to these activities of the defendants.

Tony Gullet also testified that worshiper/campers may now obtain a ten-day camping permit. Defendants enforce a five-day stay limit at the non-religious campsites at Bear Butte State Park. There was no testimony that any Lakota or Tsistsistas ceremony lasted beyond ten days. Additionally, Gullet testified that park employees are instructed to urge tourists and hikers not to interfere with the Indian worshipers at the Butte. Although plaintiffs object to the construction of platforms on the Butte, Gullet testified that the platforms were built as a means of minimizing the contacts of tourists with worshipers. Tourists are told by defendants not to stray from established hiking trails or from the viewing platforms. Violators are arrested and issued citations. Gullet testified that there are places on the Butte to which worshipers may go out of the sight of the general public. Although worshipers may still

hear other hikers and campers, Gullet testified that many of the sources of noise at the Butte are outside defendants' control. Gullet also testified that defendants permit hiking on the Butte by the general public only between the hours of eight o'clock, A. M., to eight o'clock P. M. Indian religious campers are free to stay on the Butte overnight and may freely hike and camp without regard to the time regulation.

Other construction at the park includes relocating a shop building, constructing a new access road to the shop's new location, and the repairing and resurfacing of the main road into the park. SDCL 41-2-24 and 41-17-4 provide general authority to the Department to construct these improvements in the park. Defendants contend that the construction projects were necessary to improve both the recreational use of the park by the general public and the traditional religious use by Native Americans.

The record does not disclose a single instance in which defendants denied any plaintiff access to Bear Butte for the purpose of conducting ceremonies or worship. Defendants enforced a single restriction during the period of construction on the road and parking lot at the traditional ceremonial ground: during this time period defendants permitted no camping overnight at the ceremonial ground. Daytime use of the ceremonial ground was permitted and camping overnight was restricted to a campsite in the park at Bear Butte Lake. Although defendants initially may have attempted to charge the usual camping fee for use of the lake campsite, Gullet testified that the fee requirement was waived and Native American campers were permitted to stay at the Lake free of charge during the construction period.

Defendants' witnesses testified that it is the policy of the Department to accommodate and not to infringe upon the traditional Indian uses of Bear Butte. Defendants assert that they have never in the past, nor will they in the future, deny Indian worshipers access to the Butte. Instead, defendants contend that they have sought to minimize the conflict of competing recreational and religious uses of the Butte through the creation of distinct "activity sites."

Although plaintiffs object to the requirement of registration upon entry to the park, defendants contend that registration provides essential control over traffic. The registration list shows when persons enter and leave the park. In the case of an emergency, if a visitor must be reached, defendants can quickly determine if the visitor is still in the park. Plaintiffs also object to the requirement of camping permits.

I.

The first amendment to the Constitution provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . ." In *Cantwell v. Connecticut*, 310 U. S. 296, 60 S. Ct. 900 (1940), the Supreme Court held that the free exercise clause was applicable to the states through the fourteenth amendment. The free exercise clause proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. *Braunfeld v. Brown*, 366 U. S. 599, 81 S. Ct. 1144 (1961). In this case, there is no dispute that plaintiffs' practices at Bear Butte are based upon a system of belief that is religious and is

sincerely held by plaintiffs. *Wisconsin v. Yoder,* 406 U. S. 205, 215-16, 92 S. Ct. 1526 (1972). This Court, therefore, must determine whether the conduct of defendants violates the right of plaintiffs to the free exercise of their religion.

The Supreme Court utilizes a two-part balancing test for determining whether a particular governmental action unduly burdens an individual's free exercise of religion. First, a court must decide whether the conduct, regulation, or law at issue burdens the free exercise of religion. Second, the restriction on the free exercise of religion must be balanced against the importance of the state's interest in the regulation or restriction. *See, Sherbert v. Verner,* 374 U. S. 398, 83 S. Ct. 1790 (1963); *Thomas v. Review Board of the Indiana Employment Security Division,* 435 U. S. 618, 101 S. Ct. 1425 (1981). Even if the state's interest weighs heavier in this balance the regulation or restriction will be invalid if the state's interest can be achieved by less restrictive alternative means. *Id.*

On the plaintiffs' side, "it is necessary in a free exercise case to show the coercive effect of the [restriction] as it operates against the practice of their religion." *School Dist. of Abington v. Schempp,* 374 U. S. 203, 223, 83 S. Ct. 1560 (1963). In the past, courts found this "coercive effect" when government dictates compelled citizens to violate the tenets of their religion; *see, Wisconsin v. Yoder,* 406 U. S. 205 (1972), or when government action made receipt of a public benefit or right conditional upon renunciation of a religious practice. *See, Sherbert v. Verner,* 374 U. S. 398 (1963). Thus, plaintiffs must establish that they are being injured or penalized by their ad-

herence to the tenets of their religion, or that their conduct in the course of exercising their beliefs has been unduly restricted. *Life Science Church v. Internal Revenue Service*, 525 F. Supp. 399 (N. D. Cay. 1981).

In this case plaintiffs contend that the free exercise of their religion has been burdened by the conduct of defendants in several respects: (1) defendants diminish the spiritual value of the Butte by constructing roads, parking lots, buildings, and platforms on or near the Butte; (2) defendants restricted plaintiffs' use of the traditional ceremonial area during the period of construction; (3) defendants allow tourists at Bear Butte to disrupt religious practices in numerous ways; and (4) defendants restricted the religious practices of plaintiffs at Bear Butte Lake, where they were required to camp during the period of construction.

CONSTRUCTION

The nature and purposes of the construction in progress in the park were previously set forth in this opinion. Plaintiffs contend that the alteration of the natural features of Bear Butte constitutes a violation of their religious beliefs. The construction diminishes the power of the Butte as a ceremonial ground.

It is clear to this Court that plaintiffs have no property interest in Bear Butte or in the State Park. For many years the State has administered this area as a state park. During this time it appears that plaintiffs' religious practices managed to coexist with the diverse developments that occurred there. Over this period the defendants carried out various building and construction projects at the

park, pursuant to the authority given them by SDCL 41-17-4. Most recently, defendants began constructing an access road and parking lot at the traditional ceremonial ground. Although the named plaintiffs object to the construction, defendant Gullet testified that over the past three years numerous Indian religious campers requested that the State provide safer and better access to the ceremonial grounds. Although plaintiffs object to the platforms on the Butte, Gullet testified that the Department erected the platforms as a means of restricting tourist traffic on the Butte and to provide greater privacy to vision seekers and fasters elsewhere on the Butte.

In *Hopi Indian Tribe v. Block,* 8 ILR 3073 (No. 81-0481, D. O. C., June 15, 1981), the Hopi Tribe sought to enjoin development of the Arizona Snow Bowl, a recreational facility in the San Francisco Peaks and the Coconino National Forest. The Hopi Tribe also claimed that the free exercise of their religion required that the mountains remain free of manmade disturbances. The response of the court in *Hopi Indian Tribe* is significant:

> [Plaintiffs] are essentially claiming that anyone asserting a religious interest in government property . . . has a constitutional right to demand that the government grant them access to it, yet restrict the rights of the public to, and any development of, this property in order to facilitate the exercise of religious beliefs. This Court will not extend the First Amendment to such limits. Not only is there an insufficient showing of a burden on plaintiff's Free Exercise rights, but such a result would clearly fly in the face of the principles of the Establishment Clause of the First Amendment. *Id.,* at 3075.

This Court likewise concludes that plaintiffs failed to show that the construction projects now in progress, as well as

the past development in the park, have burdened any rights protected by the free exercise clause. Plaintiffs failed to establish that particular religious practices were damaged by the construction, or that the free exercise clause obligated defendants to waive their statutory power to manage and develop the state park in the public interest. Instead, we conclude that the free exercise clause places a duty upon a state to keep from prohibiting religious acts, not to provide the means or the environment for carrying them out. *Clark v. Wolff*, 347 F. Supp. 887 (D. Neb. 1972), *aff'd*, 468 F. 2d 252 (8th Cir. 1972).

TOURISTS

This Court also rejects plaintiffs' claim that the free exercise clause obligates defendants to control the actions of the general public at the Butte which may interfere with plaintiffs' religious practices. Specifically, plaintiffs contend that defendants should not permit tourists to photograph vision seekers, ceremonies, or religious objects; bring water and food on the Butte during a vision quest; operate car horns, motorcycles, radios, etc., during a vision quest; take religious offerings off the Butte; permit non-Indian women having their menstrual period to go on the Butte during a vision quest. The first amendment does not require defendants to police the actions of tourists, even though defendants voluntarily urge tourists to respect the religious practices of plaintiffs at the Butte. In *Badoni v. Higginson*, 638 F. 2d 172, 179 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 3099 (1981), the court rejected a similar claim. The court stated:

> The First Amendment protects one against action by the government, though even then, not in all cir-

> cumstances; but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities. . . . We must accommodate our idiosyncracies, religious as well as secular, to the compromises necessary in communal life. [Cites omitted.] Were it otherwise, the Monument would become a government-managed religious shrine.

In this context, it is significant that plaintiff Grover Horned Antelope testified that he successfully completed his Vision Quest last year, in spite of distractions by tourists. This Court concludes, therefore, that defendants have not burdened the exercise of plaintiffs' religion by "allowing" tourists to act on occasion in a manner which does not conform to the dictates of plaintiffs' religion.

CEREMONIAL AREA

During the period of construction on the access road and parking lot, defendants closed *for overnight camping* the area traditionally used by plaintiffs for religious ceremonies. Defendant Gullet testified that the Department originally contemplated closing the area for all uses. See, Exhibit 1. Defendants have permitted daytime use of the area, however, and worshipers continue to use the area for sweat lodge ceremonies and fasting. Although plaintiffs have concluded that their right of access was unduly restricted, the record fails to show that a single person was ever denied access to Bear Butte for religious purposes. Defendants closed the ceremonial area temporarily and partially, in the interests of protecting the safety of the public and assuming the most expedient completion of construction. Obviously, work on the access road and parking lot would be frustrated if the vehicles

of park visitors were allowed to interfere with heavy construction machinery. The greater delay in construction only increases the danger of erosion and washouts—the same dangers which suggested the need for permanent roads in the first place.

In both *Badoni v. Higginson* and *Sequoyah v. Tennessee Valley Authority*, 620 P. 2d 1159 (6th Cir. 1980), the courts held that Native Americans' right to free exercise of religion was not unduly burdened even though their access to sacred ceremonial sites was completely barred by the permanent flooding of the sites for dam and reservoir projects. In the present case, any right of access possessed by plaintiffs is restricted only partially and temporarily. Plaintiffs failed to establish that overnight camping at the ceremonial area is an indispensible part of their religious practices. Conversely, defendants met their burden of demonstrating that the State has a compelling interest in completing the construction projects, both for environmental and administrative reasons. Excluding the public and religious users from the ceremonial area, for a limited time, is the least restrictive means of completing the project expeditiously and with minimum danger to the public and the environment. Accordingly, this Court has utilized the two-part balancing test, and concludes that the free exercise rights of plaintiffs were not infringed upon by the restrictions placed upon access to the ceremonial area.

BEAR BUTTE LAKE

During the period of construction, plaintiffs were required to camp overnight at the campsite at Bear Butte

Lake. Park regulations precluded plaintiffs from building sweat lodges at the Lake campground. But Gullet testified that during this same period plaintiffs could build their sweat lodges at the traditional ceremonial area. It is clear that defendants did not discriminate against plaintiffs *because* of their religion. The prohibition against sweat lodges at the Lake was based upon a camping regulation generally applicable to all visitors to the park. Additionally, plaintiffs were only minimally restricted with respect to the time and place of conducting the sweat lodge ceremony. Admittedly, the Free Exercise Clause is an absolute prohibition on any infringement of the freedom to believe. However, conduct undertaken because of religious beliefs is not absolutely protected, and may be regulated or prohibited by government if there is an important or compelling state interest. *Bridges v. Davis*, 443 F. 2d 970 (9th Cir. 1971), *cert. denied*, 405 U. S. 919 (1971). With respect to ceremonial restrictions at Bear Butte Lake, this Court holds plaintiffs failed to establish that defendants impermissibly burdened the practice of their religion.

Finally, this Court further concludes that plaintiffs' right of free exercise of religion is not infringed when they are required to register at the park Visitor Center and acquire camping permits. The courts hold permit requirements unconstitutional only when they have been used to restrain first amendment rights without narrow, objective standards. *Shuttlesworth v. Birmingham*, 394 U. S. 147, 89 S. Ct. 935 (1969); *Padoni v. Higginson*, 638 F. 2d at 180. Plaintiffs did not allege that the permit requirement restricted plaintiffs' access to the Butte or to ceremonial sites. Nor did they allege that any such per-

mit was requested and denied. Plaintiffs simply object to the requirement of permits and registration at a place so deeply rooted in their religious tradition. By requiring permits and registration, however, defendants have not burdened plaintiffs' religious exercises in the area of Bear Butte. The requirements do not require plaintiffs to violate any tenet of their religion, but serve valid state interests in controlling traffic at the park and in providing the means to contact visitors in case of an emergency.

II.

Plaintiffs also brought this equitable action under the American Indian Religious Freedom Act, 42 U. S. C. § 1996, Article 18 of the Universal Declaration of Human Rights, and the Article 18 of the International Covenant on Civil and Political Rights. Plaintiffs seek substantial damages for violation of their civil rights. 42 U. S. C. § 1983. The American Indian Religious Freedom Act provides, *inter alia*, that "it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe . . . and exercise [their] traditional religions, including, but not limited to access to sites, use and possession of sacred objects, and the freedom to worship. . . ." In *Hopi Indian Tribe v. Block*, 8 IRL at 3076, the court correctly analyzed the legislative history and purpose of the Act.

First, it is not clear that the Act governs the conduct of state governments or agencies. It applies expressly only to the federal government. Second, the Act does not create a cause of action in federal courts for violation of rights of religious freedom. The Act is merely a state-

ment of the policy of the federal government with respect to traditional Indian religious practices.

> The Act was meant to insure that American Indians were given the protection that they are guaranteed under the First Amendment; it was not meant to in any way grant them rights in excess of those guarantees. . . . The Act does not require that access to all publicly owned properties be provided to the Indians without consideration for other uses or activities, nor does it require that native traditional religious considerations always prevail to the exclusion of all else. *Id.; see also,* H. REP. 1308, 95th Cong., 2nd Sess. (1978).

This Court has concluded that with respect to the free exercise rights of plaintiffs, the conduct of defendants complied with the dictates of the first amendment. The American Indian Religious Freedom Act requires no more. This Court likewise fails to find any authority that indicates a legally cognizable right or cause of action is created by either Article 18 of the Universal Declaration of Human Rights or Article 18 of the International Covenant on Civil and Political Rights. Plaintiffs cited no authority to support the claim that these enactments or declarations create legal rights in addition to those recognized by the first amendment. Accordingly, this Court concludes that plaintiffs' claims under the Declaration and the Covenant are equally without merit.

In summary, this Court concludes that plaintiffs failed to establish any infringement of a constitutionally cognizable first amendment right. To the extent their right of access was temporarily restricted at the ceremonial grounds, this Court concludes that the plaintiffs' interests are outweighed by compelling state interests in preserving

the environment and the resource from further decay and erosion, in protecting the health, safety, and welfare of park visitors, and in improving public access to this unique geological and historical landmark.

It is worth noting, finally, that some courts have expressed great concern that special treatment such as that afforded religious users of the park may constitute a violation of the Establishment Clause. At Bear Butte State Park, religious campers have a special camping area, from which the general public is excluded. Religious campers may acquire a permit to stay in the park up to ten days. The general public is limited to five days. Religious campers were permitted to camp free of charge at Bear Butte Lake. The general public must pay a fee to camp there. At the Butte itself, the Department has limited public access to established trails and platforms. Indian religious users may freely roam the Butte. Finally, the general public can hike the Butte only during a twelve-hour period of the day. Religious campers can stay on the Butte without regard to these time restrictions. Thus, defendants have gone far to afford special treatment and special privileges to American Indian religious practices at the Butte. Defendants justify their policies because the Indian religious tradition helps define the value and importance of Bear Butte to this region. In so doing, however, the government risks being hailed into court by others who claim that the same rights of the general public are being unduly burdened, or that state government has become "excessively entangled" with religion, in violation of the Establishment Clause. *See, e.g., Widmar v. Vincent,* 102 S. Ct. 269, — U. S. — (1981).

For the foregoing reasons, this Court grants defendants' motion for summary judgment on all claims stated in plaintiffs' Complaint. Plaintiffs' prayer for declaratory and injunctive relief is denied. Having failed to establish a deprivation of their constitutional rights, plaintiffs' claim for damages under 42 U. S. C. § 1983 is also denied. This Court will issue an order lifting the injunction previously entered with respect to construction at the ceremonial grounds.

The foregoing constitutes this Court's findings of fact and conclusions of law.

BY THE COURT:

/s/ Andrew W. Bogue, Chief Judge
United States District Court

APPENDIX 1B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1852

Frank Fools Crow, Arvol Looking Horse, Pete Catches, Grover Horned Antelope, Larry Red Shirt, Selo Black Crow, and Francine Nelson, for Themselves and on behalf of the Lakota Nation and Persons Practicing the Lakota Religion, and Bill Red Hat, Jr., Terry Wilson, Laird Cometsevah, Walter Hamilton, The Southern Cheyenne Research and Human Development Association, Inc., for Themselves and on behalf of the Tsistsistas Nation and Persons Practicing the Tsistsistas Religion,

Appellants,

vs.

Tony Gullet, in his Official Capacity as Park Manager of Bear Butte State Park, The South Dakota State Game, Fish and Parks, and The State of South Dakota,

Appellees.

Appeal from the United States District Court
for the District of South Dakota

Submitted: February 17, 1983
Filed: May 10, 1983

Before LAY, Chief Judge, BRIGHT and ROSS, Circuit Judges.

PER CURIAM.

Plaintiffs-appellants, spiritual leaders and religious practioners of the Lakota and Tsistsistas Nations, brought a class action suit against defendants-appellees, the Manager of the Bear Butte State Park, the South Dakota Fish and Parks Department, and the State of South Dakota. Appellants sought declaratory and injunctive relief, as well as damages under 42 U. S. C. § 1983 (1976) on the grounds the appellees' actions in developing and regulating public use of Bear Butte State Park violated appellants' religious free exercise rights under the first amendment,[1] the American Indian Religious Freedoms Act (42 U. S. C. § 1996 (Supp. 1979)), Article 18 of the Universal Declaration of Human Rights, and Article 18 of the International Covenant on Civil and Political Rights. District court jurisdiction was based on 28 U. S. C. §§ 1331, 1343 (3) & (4) (1976).

Bear Butte, a geological formation on the eastern edge of the Black Hills in South Dakota, was acquired by the state in 1962 and designated as a state park. The Butte is an important religious site for the Lakotas and Tsistsistas, and has been traditionally used by these people for various religious ceremonies, including the Lakotas' Vision Quest, a ceremony which may last for several days. In recent years the state has developed the park by constructing roads, a machine shop, campgrounds, parking lots, wooden walkways on the Butte, and a visitor's center. Most recently, the state has undertaken several construction projects including constructing an access road to and

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[1]U. S. CONST. amend. I.

a parking lot near the area of the Butte traditionally used by the Indians as a ceremonial ground and campsite, relocating the maintenance shop, and repairing and resurfacing the main road into the park. In addition, the state requires that all persons entering the park register at the visitor's center and that all persons wishing to camp at the park obtain a camping permit. The permit for ceremonial campers is free of charge and allows a ten day stay.

Appellants essentially maintain that the state's development, construction, and regulatory activities violate their constitutional and statutory religious rights in that (1) the development, construction, and resulting increase in tourist presence at the park have diminished the spiritual value of the Butte and have impaired religious ceremonies; (2) appellants' access to the traditional ceremonial grounds and their religious activities at other campsites were restricted during the state's construction activities; (3) registration and camping permit requirements impermissibly burden appellants' religions; (4) appellants have failed to control tourists disrupting appellants' religious practices at the Butte.

On June 18, 1982, pursuant to the agreement of the parties, trial on the merits was consolidated with the evidentiary hearing held on appellants' motion for a preliminary injunction, and the district court[2] considered the merits of the dispute on the parties' cross-motions for summary judgment.[3] The district court generally found

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[2]The Honorable Andrew W. Bogue, Chief Judge, United States District Court for the District of South Dakota.

[3]*See Fools Crow v. Gullet*, 541 F. Supp. 785, 788 (D. S. D. 1982). Although the district court indicated that the merits

(Continued on following page)

that the plaintiffs had not shown that the defendants' development, construction and regulatory actions burdened plaintiffs' religious exercises in the Bear Butte area, and stated in summary that:

> plaintiffs failed to establish any infringement of a constitutionally cognizable first amendment right. To the extent their right of access was temporarily restricted at the ceremonial grounds, this Court concludes that the plaintiffs' interests are outweighed by compelling state interests in preserving the environment and the resource from further decay and erosion, in protecting the health, safety, and welfare of park visitors, and in improving public access to this unique geological and historical landmark.

Fools Crow v. Gullet, 541 F. Supp. 785, 794 (D. S. D. 1982).[4]

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were before the court on the parties' cross-motions for summary judgment, it is clear from the record and opinion in this case that in fact the court was entering a judgment for defendants after a stipulated trial on the merits. Thus, for purposes of appellate review the standard is that applicable to such judgments (i. e., the clearly erroneous doctrine), rather than the stringent standard of review applicable to summary judgment (viewing evidence in light most favorable to nonmoving party to determine if there is genuine issue of material fact). *Cf. Toney v. Bergland*, 645 F. 2d 1063, 1066 (D. C. Cir. 1981) (for purposes of appellate review, in some circumstances cross-motions for summary judgment may be treated as a mutual request for trial on a stipulated record).

[4]*See Badoni v. Higginson*, 638 F. 2d 172, 176-80 (10th Cir. 1980) (denied relief to members of the Navajo tribe challenging, on first amendment free exercise grounds, the governmental regulatory and development activities at the Rainbow Bridge National Monument and Glen Canyon Dam), *cert. denied*, 452 U. S. 954 (1981); *Sequoyah v. TVA*, 620 F. 2d 1159, 1164-65 (6th Cir.) (rejected free exercise challenge by Cherokee Indians to the flooding of ceremonial grounds caused by the Tellico Dam), *cert. denied*, 449 U. S. 953 (1980); *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 552 F. Supp. 951,

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The district court also concluded that even assuming that the American Indian Religious Freedom Act (42 U. S. C. § 1996), Article 18 of the Universal Declaration of Human Rights, and Article 18 of the International Covenant on Civil and Political Rights applied to the state in this case, these provisions did not establish any legal rights or causes of action beyond those recognized under the first amendment. *See Fools Crow v. Gullet, supra,* 541 F. Supp. at 793-94. *See also Hopi Indian Tribe v. Block,* 8 I. L. R. 3073, 3076 (D. D. C. 1981).

Accordingly, the district court granted defendants' motion for summary judgment as to all claims raised in plaintiffs' complaint. Before this court, appellants have essentially raised the same contentions made in the district court. We have carefully considered appellants' arguments, the record, and the district court opinion, and conclude that the court was neither clearly erroneous as to its factual determinations nor mistaken as to the law it was applied to the facts. Accordingly, we affirm on the basis of the district court's opinion. *See* 8th Cir. R. 14.

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CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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954 (N. D. Cal. 1982) (road construction and accompanying intrusions into area sacred to several Indian tribes did not unlawfully burden Indian plaintiffs' free exercise rights). *See also Inupiat Community of Arctic Slope v. United States,* 548 F. Supp. 182, 186-87 (D. Alaska 1982); *Hopi Indian Tribe v. Block,* 81 I. L. R. 3073 (D. D. C. 1981).

APPENDIX 1C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1852-SD September Term, 1982

FRANK FOOLS CROW, ET AL.,

Appellants,

vs.

TONY GULLET, in his official capacity as Park Manager of Bear Butte State Park, et al.,

Appellees.

Appeal from the United States District Court
for the District of South Dakota

JUDGMENT

(Filed July 5, 1983)

This appeal from the United States District Court was submitted on the record of the said District Court, briefs of the parties, and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the said District Court in this cause be, and the same is hereby, affirmed on the basis of the District Court's opinion. See Eighth Circuit Rule 14.

Costs taxed in favor of Appellees: May 10, 1983

Costs of briefs for recovery from Appellants: $18.50

A True Copy:

ATTEST:

Clerk, U. S. Court of Appeals, Eighth Circuit 6/29/83

APPENDIX 1D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

82-1852-SD September Term 1982

FRANK FOOLS CROW, ET AL.,

Appellants,

vs.

TONY GULLET, ETC., ET AL.,

Appellees.

Appeal from the United States District Court
for the District of South Dakota

The Court, having considered appellants' petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

June 14, 1983